82-553

Office - Supreme Court, U.S.
FILED
SEP 27 1982
ALEXANDER L. STEVAS,
CLERK

NO. 81-_____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

PETER JAMES SCOTT, ET AL.,
Petitioners,

versus

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MICHAEL A. MANESS
2000 North Loop West
Suite 123
Houston, Texas 77018
(713) 957-2800
Attorney for Petitioners

September 1982

Alpha Law Brief Co., Inc.—5606 Parkersburg—Houston, Texas 77036—223-3003

QUESTIONS PRESENTED

(1) Whether the erroneous admission into evidence of prejudicial hearsay radio communications by purported co-conspirators, over proper and timely defense objection, may properly be excused as harmless error under Rule 52(a) of the Federal Rules of Criminal Procedure, despite the Government's failure to authenticate the alleged communications or to prove knowing participation in the conspiracies alleged in the indictment?

(2) Whether the circumstantial evidence in the record is insufficient to support the convictions?

LIST OF PARTIES

The parties to this proceeding in the Court of Appeals were as follows:

Defendants-Appellants: Peter James Scott, Don Richard Rainey, Steven Clyde Watson, Daniel Edwin White, Gary Lee Anderson, Charles Joseph Howard, Julio Rodrigues, Pedro Aparicio, Luis Garcia, Charles Thomas Pollard, Fermin Gomea Polo and Lawrence W. Griffith.

Plaintiff-Appellee: United States of America.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	1
LIST OF PARTIES	1
TABLE OF AUTHORITIES	III
OPINION BELOW	1
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	14
CONCLUSION	17
APPENDIX	A-1

TABLE OF AUTHORITIES

CASES	Page
DeLuna v. United States, 308 F.2d 14 (5 Cir., 1962), *rehearing denied*, 324 F.2d 375 (5 Cir., 1963)	14
Glasser v. United States, 315 U.S. 60 (1942)	15, 16
Hamling v. United States, 418 U.S. 87 (1974)	16
Harryman v. Estelle, 616 F.2d 870 (5 Cir., 1980) (en banc), *cert. denied*, 449 U.S. 860	15
Kotteakos v. United States, 328 U.S. 750 (1946)	14
United States v. Glasgow, 658 F.2d 1036 (5 Cir., 1981)	16
United States v. Heller, 625 F.2d 594 (5 Cir., 1980)	14
United States v. James, 590 F.2d 575 (5 Cir., 1979) (en banc), *cert. denied*, 442 U.S. 917	11
United States v. Lynn, 608 F.2d 132 (5 Cir., 1979)	15
United States v. Macker, 608 F.2d 223 (5 Cir., 1979)	16
United States v. Malatesta, 590 F.2d 1379 (5 Cir., 1979) (en banc), *cert. denied*, 440 U.S. 962	16
United States v. Marx, 635 F.2d 436 (5 Cir., 1981)	16
United States v. Scott, 678 F.2d 606 (5 Cir., 1982)	1
United States v. Underwood, 588 F.2d 1073 (5 Cir., 1979)	14
United States v. Williamson, 450 F.2d 585 (5 Cir., 1971), *cert. denied*, 405 U.S. 1026	15

STATUTES	
21 U.S.C. section 841(a)(1)	2, 3
21 U.S.C. section 846	2, 3
21 U.S.C. section 952(a)	3
21 U.S.C. section 963	3

NO. 81-_____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

PETER JAMES SCOTT, ET AL.,
Petitioners,

versus

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners Peter James Scott, Daniel Edwin White, Pedro Aparicio, Charles Thomas Pollard and Lawrence W. Griffith respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this cause on June 18, 1982.

OPINION BELOW

The opinion of the Court of Appeals is reported as *United States v. Scott*, 678 F.2d 606 (5 Cir., 1982), and is reproduced in the Appendix of this petition, together

with the judgment and the order denying the petition for rehearing.

JURISDICTION

The opinion and judgment of the Court of Appeals were entered on June 18, 1982. All Petitioners filed a timely petition for rehearing, which was denied on August 30, 1982. This petition for certiorari was filed within 60 days thereafter. This Court's jurisdiction is invoked under 28 U.S.C. section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the due process clause of the Fifth Amendment to the Constitution of the United States and the following Federal criminal statutes:

Title 21, U.S.C., section 846:

> *"Attempt and conspiracy*
>
> Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy."

Title 21, U.S.C., section 841(a)(1):

> *"Prohibited Acts A*
>
> *Unlawful Acts*
>
> (a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance * * * ."

Title 21, U.S.C., section 963:

"Attempt and conspiracy

Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy."

Title 21, U.S.C., section 952(a):

"Importation of controlled substances

Controlled substances in schedules I or II and narcotic drugs in schedules III, IV, or V; exceptions

(a) It shall be unlawful to import into the customs territory of the United States from any place outside thereof (but within the United States), or to import into the United States from any place outside thereof, any [scheduled] controlled substance * * * ."

STATEMENT OF THE CASE

All five Petitioners, together with seven others whose convictions were reversed by the Court of Appeals for insufficient evidence, were indicted and ultimately found guilty by a jury in the United States District Court for the Southern District of Texas, Galveston Division, for conspiring to import and to possess with intent to distribute more than 15 tons of marihuana in violation of 21 U.S.C. sections 841(a)(1), 846, 952(a) and 963. The marihuana was discovered by the United States Coast Guard

aboard an abandoned shrimper, the LITTLE AL, seized in an area of the Gulf of Mexico known as the Bucanneer Rigs, a popular fishing spot approximately 26 miles southeast of Galveston, Texas (R. 5: 159-60). Petitioners and their seven companions were aboard two other vessels, the TYRANT III and the DORADO, seized by the Coast Guard approximately eight miles from the LITTLE AL (R. 4: 489-90). No trace of marihuana was discovered aboard either of these two vessels.

Moreover, the Government offered no direct evidence either that Petitioners had affirmatively joined in the conspiracies alleged or that any Petitioner had actually possessed or attempted to import the contraband discovered aboard the LITTLE AL. The case against all Petitioners was entirely circumstantial.

Less than a week before the Coast Guard seizures, Petitioner Charles Thomas Pollard inquired about pleasureboats for sale in the Freeport, Texas area, indicating that he intended to use the vessels as fishing charters and that he had "a [tax] write-off or something of that nature in mind" (R. 2: 141-44; 156-57). Pollard, accompanied by Petitioner Peter James Scott, inspected and eventually purchased for cash two Hatteras class sport fishermen, the TYRANT III and the DORADO (R. 2: 34-151). Both Pollard and Scott provided their correct names to the sellers of the vessels and did not attempt to conceal their identities (R. 2: 130-32), although no sea trials or execution of title papers were undertaken before transfer of the vessels to Pollard (R. 2: 51-52; 57-58; 117; 122-23). Thereafter, Scott and Petitioners Daniel Edwin White and Lawrence W. Griffith were seen at the marina where the DORADO was berthed (R. 6: 184-87; 204; 207-08).

On the morning of Sunday, April 5, 1982, the Galveston Coast Guard began intercepting a series of "unusual" radio transmissions on the 14.3670 megahertz frequency, as a result of instructions from the Miami Coast Guard, relayed through New Orleans, to monitor that frequency (R. 3: 219-232; 239). Quartermaster Jeffrey L. Huse, the Operations Duty Officer in the Operations Center of the Galveston Coast Guard station, logged the following transmission at the following times on Sunday, April 5 (R. 3: 250-56):

8:30 a.m.	("105" calling "115". "115" calling "105".)
8:40 a.m.	"We're moving out." (Sent "in the blind" by "115". No response from "105")
8:43 a.m.	(Communication established between "105" and "115")
	"105": "Have you seen your cousin?"
	"115": "No, I haven't seen Willie."
9:10 a.m.	"105" to "115": "Go to the next one." ("105" then called "116"; "105" and "115" came back and continued talking to each other, although confusion of frequencies made communication impossible.)
9:37 a.m.	"Go to channel 11 and use the two names that I gave you." Answer: "Roger 4." (Sender and receiver unidentified)
9:46 a.m.	"105" to "115": "I sent them out last night. I have got them on VHF. ETA should have been about 0200. Keep trying."

9:53 a.m. "105" to "115": "When you get to the point, anchor. I am going to find brother even if I have to go to his house." "115": "Roger 4."

12:53 p.m. "105" to "115": "Prepared to meet two boats. Number one and number two. Rendezous within the same hour, same position."

Apparently no further transmissions were monitored during the remainder of the afternoon and evening of April 5. However, the following transmissions were logged by Quartermaster Huse on the morning of Monday, April 6 (R. 3: 256-58).

6:30 a.m. (After numerous communication attempts) "115": "We have negative sighting but we have contact. It's spooky because they are out here. Last night we steamed downtown."

"105": "Stay put. We'll get a bird in the air. We'll find both of you and get you together. What is your heading now?"

"115": "Southeast during the morning but northwest now."

"105": "We'll be down in 30 to 45 minutes."

7:50 a.m. "115": "I'm about 50 minutes to scene and am going to channel 13."

"105": "Tell your friend, 13."

A Coast Guard helicopter searching "the same general area" of the Buccaneer Rigs where the LITTLE AL was discovered later in the day did not observe any

suspicious activity or vessels in the area when it flew over it shortly after 9 a.m. on April 6 (R. 4: 673-74; R. 5: 42).

Between 8 a.m. and noon on April 6, heavy Monday morning activity at the Operations Center prevented Quartermaster Huse from logging the precise times of various other communications. During that roughly four-hour period the following transmissions were recorded (R. 3: 259-62):

> "105": "Little Man just walked in and is personally going to take charge." ("105" then requested "115's" position, asking if he had on radar the "set of rigs * * * that looks like an airport approach")
>
> "115": "Oh, that's what you call Buccaneer Rigs."
>
> "115": "I am at 5622 and 1081.5. You know what I mean."
>
> "115": "I want to get the rendezvous over because we're low on food."

After concluding that the references to "5622" and "1081.5" in the preceding communications were LORAN (Long Range Aid to Navigation) coordinates, Quartermaster Huse plotted the resulting position and determined that it was a location approximately 8 to 10 miles south-southeast of the Buccaneer Rigs (R. 3: 261-62). Accordingly, a second Coast Guard helicopter on routine pollution patrol was diverted to the area shortly before 2 p.m. (R. 3: 379).

Thereafter, Galveston monitored the following radio communications on the 14 megahertz frequency (R. 3: 263-65):

2:00 p.m.	"105" to "115": "Give it all to Willie."
	"115" to "105": He can't take it all."
	"105": "Clean off the - - - -." (Transmission unclear: "catch," "hatch" or "deck")
2:25 p.m.	"115" to "105": "Red Stripe is here. The same dude."

At approximately the same time, on another frequency (Channel 9, VHF), Quartermaster Huse overheard communications between "Willie Willie" and "Dead End" and, approximately a minute later, either "Willie Willie" or "Dead End" repeated the message "Red Stripe is here." Then on the 14 megahertz frequency, "105" directed "115" to "Go take a ride with Willie Willie. Take all the papers off." Apparently some confusion followed this communication, and "105" then asked "115", "Is your friend there?", to which "115" responded "negative." "105" and "115" then agreed to attempt to communicate again on the same frequency at 7 p.m. that evening (R. 3: 264-65). "105" did attempt to call "115" at 7 p.m., with no results (R. 3: 265). During the same afternoon considerable numbers of communications from other vessels on the same frequencies were monitored by the Coast Guard (R. 3: 400-403).

When the second helicopter arrived on the scene at approximately 2:16 p.m. at an altitude of approximately 1,500 feet, it located a white fishing vessel approximately five miles south-southeast of the Buccaneer Rigs; it appeared to be stationary (R. 4: 608-09; 611). Upon investigating the helicopter crew discovered that the vessel in question was a shrimper, the LITTLE AL, at anchor and riding low in the water (R. 4; 611-14). Again climb-

ing to an altitude of approximately 1,500 to 2,000 feet, the helicopter crew observed two other vessels approximately ten miles southwest of their position which, upon investigation, proved to be the TYRANT III and the DORADO (R. 4: 615-18). As the helicopter initially approached the latter two vessels at a low altitude, they were approximately 200 to 300 yards apart, with the TYRANT III underway at a low rate of speed in a generally westerly direction and the DORADO apparently at anchor, with three people visible, two of whom appeared to be fishing (R. 4: 619-21; 695). The helicopter crew subsequently observed the TYRANT III come alongside the LITTLE AL, where it remained for approximately five minutes before getting underway on a generally southwesterly heading at a moderate rate of speed (R. 4: 623-25; 676-79).

A Coast Guard surveillance aircraft in the vicinity thereafter observed the TYRANT III and the DORADO come together stern to stern, remain together for a brief period, then rapidly get underway and make a rapid series of speed and course changes (R. 3: 423-27). The vessels then came together a second time, at which time the crew members of the aircraft saw a line running between them and also observed what appeared to be a long white object thrown from one of the boats (R. 4: 518-20). The object, a roll of plastic approximately four to five feet long, was subsequently retrieved by the helicopter crew, which had returned to the area following refueling (R. 4: 628; 621-32).

The Coast Guard subsequently boarded the LITTLE AL and discovered its cargo of marihuana (R. 5: 80-86). Leaving one member of the boarding party aboard for

security, the Coast Guard then proceeded to intercept the TYRANT III, approximately five miles from the LITTLE AL, where it was boarded and subjected to a safety inspection for approximately 20 minutes (R. 5: 89-95). Petitioner Lawrence W. Griffith identified himself as the skipper and stated that the papers for the vessel were on board the DORADO (R. 6: 82-83). After completing the inspection of the TYRANT III and discovering that it was "clean" the Coast Guard was then advised that the helicopter was escorting the DORADO back to the area for boarding and search (R. 5: 96-97). Petitioner Pollard identified himself as the skipper of the vessel, produced its papers and appeared "knowledgeable" about it (R. 6: 95-96). An inspection of the DORADO likewise revealed no contraband or any violations of law (R. 5: 100-101). Nevertheless, the Coast Guard base at Galveston instructed the boarding party by radio to escort both the TYRANT III and the DORADO back to Galveston (R. 5: 102-103).

Petitioner Griffith's fingerprints were eventually discovered on a chart of the Gulf of Mexico that had been taped to the chart table on the LITTLE AL, on a can of starter fluid recovered from a drawer beneath the bunk in the captain's quarters and on a jar of bayleaves in the galley above the sink (R. 7: 174-76). Petitioner Pedro Aparicio's palm print was found on a chart that had been taped to the chart table (R. 7: 150-52). The frequency numbers handwritten in ink on the channel selectors of the high-frequency radios discovered aboard all three vessels were, in a number of instances, identical (R. 7: 26-35).

At trial, before hearing the testimony of Quartermaster Huse concerning the radio transmissions intercepted on

April 5 and 6, the District Court excused the jury for the purpose of making a preliminary determination of the admissibility of such testimony, as required by *United States v. James*, 590 F.2d 575 (5 Cir. 1979) (en banc), *cert. denied*, 442 U.S. 917. The Government suggested that it desired to offer such testimony both in connection with the issue of probable cause (the Trial Court having carried Petitioners' motion to suppress evidence with the case) and in the presence of the jury "to show the results and acts that were taken by the Coast Guard personnel themselves, that is, what they did based upon these transmissions" (R. 3: 244).

However, it thereafter developed that Quartermaster Huse had no independent recollection of the communications with respect to which he testified but that his testimony was drawn exclusively from handwritten notes that he had prepared (R. 3: 282-83). He also stated that he was unable to differentiate between those communications that he had actually heard himself and those that had been heard by the radio operator (Buchhorn) and then relayed to him for paraphrased transcription (R. 3: 242; 283-84; 361; 373). Thus, Huse specifically admitted that "some of these notes were basically what Mr. Buchhorn told [him]" (R. 3: 284).

Thereafter, Petitioners specifically objected to the introduction of Huse's testimony before the jury on the grounds that (a) the radio transmissions themselves were only conditionally relevant and had not properly been authenticated, as required by Rules 104(b) and 901(a) of the Federal Rules of Evidence, because there had been no affirmative showing by substantial independent evidence that the communications originated with or involved any

of the Petitioners or otherwise related to the alleged conspiracies on trial; (b) such transmissions, to the extent they contained extra-judicial assertions of fact, were hearsay and their admission would violate the *James* mandate because there had been no showing either that the statements were made in furtherance of the conspiracies alleged or that any Petitioner had knowingly participated in such alleged conspiracies, and (c) given Huse's admission that a portion of the notes he had made were based on the hearsay communications of another person (Buchhorn), and that he had no independent recollection of any of the facts contained in his handwritten notes, his testimony itself plainly constituted double hearsay and was therefore inadmissible (R. 3: 301-309).

The Trial Court overruled the third objection and conditionally overruled the first two objections, allowing the testimony before the jury but requiring the Government to establish a "nexus" between the vessels in question, the radio transmissions and Petitioners (R. 3: 314-15).

Quartermaster Huse was thereupon permitted to testify in the presence of the jury essentially to the same series of radio communications about which he had previously testifed (R. 3: 317-44). Over renewed objection that the testimony was hearsay, he was further allowed to testify to the purported communications concerning the position heading and alleged activities of "115" (R. 3: 328-29) and to explain to the jury his plotting of the LORAN navigational coordinates on a nautical chart reflecting the position of the LITTLE AL approximately ten miles south-southeast of the Buccaneer Rigs (R. 3: 343-52). On cross-examination he admitted that it was possible that there were not, in fact, four separate sources of radio trans-

missions but simply one or more individuals using different identifying names (R. 3: 357-58), that none of the voice transmissions were identifiable or attributable to any particular individual (R. 3: 362, 365) and that, apart from the LORAN coordinates, he was unable to state with any degree of assurance the geographical location from which the transmissions originated (R. 3: 354-55, 366).

All 12 individuals arrested aboard the TYRANT III and the DORADO were convicted at trial and sentenced to varying terms of imprisonment and fines. On appeal, the Court of Appeals reversed seven of the convictions, concluding that the evidence was insufficient. The Court affirmed Petitioners' convictions, rejecting claims that the evidence was insufficient as to them and that the Trial Court had committed prejudicial error by admitting evidence of the radio communications, over proper and timely defense objection, without the authentication demanded by the Federal Rules of Evidence and despite the absence of any independent corrobative evidence of the conspiracies alleged in the indictment or of Petitioners' knowing participation in them. Conceding that the evidence was "scarcely crushing," 678 F.2d at 610, the Court of Appeals nevertheless concluded that "in view of the strength of the evidence against those whose convictions we affirm, any error in admitting these rather ambiguous [radio] transmissions was harmless. The same is true of [Petitioners'] third objection to some of this evidence as double hearsay." 678 F.2d at 612.

Thus, baldly stated, the Court of Appeals concluded that what might otherwise have been prejudicial error in the admission of evidence was nevertheless "harmless" under Rule 52(a) of the Federal Rules of Criminal

Procedure because—and apparently only because—the other, independent evidence of guilt (while "scarcely crushing") was minimally sufficient to sustain the convictions.

REASONS FOR GRANTING THE WRIT

Rule 52(a) of the Federal Rules of Criminal Procedure provides that "[a]ny error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." At least since *Kotteakos v. United States*, 328 U.S. 750, 764-65 (1946), this standard of harmlessness has demanded that the reviewing court conclude that "the error did not influence the jury, or had but very slight effect." See, e.g., *United States v. Heller*, 625 F.2d 594, 599 (5 Cir., 1980); *United States v. Underwood*, 588 F.2d 1073, 1076 (5 Cir., 1979).

The circumstances in which harmlessness may appropriately be found in accordance with Rule 52(a) are limited. *DeLuna v. United States*, 308 F.2d 140, 155 (5 Cir., 1962), *rehearing denied*, 324 F.2d 375 (5 Cir., 1963). Invariably the Courts of Appeals, in cases involving a claim that prejudicial evidence has been erroneously admitted over proper and timely defense objection, have limited the application of Rule 52(a)'s harmless error doctrine to instances in which (i) the evidence was merely cumulative of other evidence properly admitted or admitted without objection; (ii) the character of the error, evaluated in the context of the entire record, was trivial or insignificant in its impact on the rights of the accused, or (iii) the independent evidence of guilt was overwhelming, thereby implying that the erroneously admitted evidence could have had no

measurable impact on the jury's deliberations. See, e.g., *United States v. Lynn*, 608 F.2d 132, 135-36 (5 Cir., 1979); *United States v. Williamson*, 450 F.2d 585, 591 (5 Cir., 1971), *cert. denied*, 405 U.S. 1026; cf. *Harryman v. Estelle*, 616 F.2d 870 (5 Cir., 1980) (en banc), *cert. denied*, 449 U.S. 860 (constitutional error found harmless beyond a reasonable doubt in view of alleged "overwhelming evidence of guilt" of accused).

In the present case, by contrast, the Court of Appeals has apparently now extended the harmless error doctrine to every instance in which the independent evidence of guilt has been found to be sufficient to support a Federal criminal conviction under the standard prescribed by *Glasser v. United States*, 315 U.S. 60 (1942). Indeed, the Court of Appeals advances no other explanation for its conclusion that within the context of the entire record the erroneously admitted evidence was "harmless." The clear implication of its holding is that, in every case in which the evidence is otherwise minimally sufficient to support the conviction, any error in the admission of evidence will be disregarded. Such a conclusion is a manifest and unwarranted perversion of Rule 52(a).

It cannot seriously be maintained that the error in admitting testimony concerning the radio communications was not prejudicial or somehow did not affect the substantial rights of Petitioners. Despite the Government's inability to demonstrate, as required by Rule 104(b) of the Federal Rules of Evidence, that any Petitioner was responsible for any of the radio transmissions in question, or that such transmissions were in fact what the Government claimed they were (i.e.,

anonymous communiques between participants in a marihuana smuggling operation), the Court of Appeals nevertheless sanctioned their admission into evidence, thereby permitting the jury to speculate that Petitioners were, in fact, somehow connected with the transmissions.

The Court of Appeals likewise casually allowed Huse to testify not only to what he personally had heard but also to what his radio operator, Buchhorn, said he heard, in plain contravention of the hearsay rule. The integrity of the Federal Rules of Evidence can hardly be maintained if violations as egregious as this one can be swept under the rug as mere "legal technicalities." Given Huse's inability to recall independently the communications he logged, there was simply no discernible basis for admitting his testimony. In such circumstances the obvious hearsay violation, coupled with its equally obvious prejudicial effect, demanded that the testimony be excluded.

The Court of Appeals' misapplication of the harmless error doctrine is, finally, compounded by the utter inadequacy of the evidence to establish the guilt of any of the Petitioners beyond a reasonable doubt. At most the Government proved no more than physical proximity to contraband, a circumstance that has never been regarded as sufficient to establish knowing participation in a conspiracy. *United States v. Malatesta*, 590 F.2d 1379, 1382 (5 Cir., 1979) (en banc), *cert. denied*, 440 U.S. 962; *Hamling v. United States*, 418 U.S. 87, 124 (1974); *Glasser v. United States*, 315 U.S. 60, 80 (1942); *United States v. Macker*, 608 F.2d 223, 227 (5 Cir., 1979); *United States v. Glasgow*, 658 F.2d 1036, 1040 (5 Cir., 1981); *United States v. Marx*, 635 F.2d 436 (5 Cir., 1981). In circumstances as equivocal

as these, the misapplication of Rule 52(a) is particularly unwarranted and substantially erodes the integrity of the Federal Rules of Evidence. Unless objections during the course of a criminal trial are to become a meaningless, formalistic exercise in futility, the substantial prejudicial error presented by the record in this case cannot be passed off as harmless.

CONCLUSION

For all of the foregoing reasons, Petitioners respectfully pray that their petition for a writ of certiorari in this cause be granted.

Respectfully submitted,

MICHAEL A. MANESS
2000 North Loop West
Suite 123
Houston, Texas 77018
(713) 957-2800

Attorney for Petitioners